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7                   UNITED STATES DISTRICT COURT  
8                   EASTERN DISTRICT OF WASHINGTON

9                   KEYBANK NATIONAL ASSOCIATION,

10                  Plaintiff,

11                  v.

12                  MOSES LAKE INDUSTRIES, INC.,  
13                  a Washington Corporation,

14                  Defendant.

NO. CV-09-162-EFS

**ORDER GRANTING PLAINTIFF'S  
MOTION TO DISMISS AND GRANTING  
DEFENDANT'S MOTION TO AMEND**

15         Before the Court, without oral argument, are Plaintiff Keybank  
16 National Association's ("Key") Motion to Dismiss Amended Counterclaims  
17 (Ct. Rec. [40](#)) and Defendant Moses Lake Industries' ("MLI") Motion to  
18 Amend. (Ct. Rec. [52](#).) After reviewing the submitted materials and  
19 relevant authority, the Court finds that MLI has not pled its claim for  
20 negligent misrepresentation with the requisite particularity, but that  
21 it has stated a claim upon which relief may be granted. Accordingly, the  
22 Court grants both Plaintiff's and Defendant's motions.

23                   **I. Background**

24         Key filed its Complaint against MLI on February 17, 2009, alleging  
25 that MLI breached an oral insurance-swap contract. (Ct. Rec. [1](#).) On  
26 March 10, 2009, MLI filed its Answer and four (4) counterclaims: breach

1 of a different contract, negligent misrepresentation, conversion, and  
2 breach of fiduciary duty. (Ct. Rec. 7.) On Key's motion, (Ct. Rec. 10),  
3 the Court dismissed MLI's counterclaim for breach of fiduciary duty  
4 without prejudice because MLI stated it would pursue this claim in state  
5 court. (Ct. Rec. 30 at 5.) The Court granted leave to amend the claim  
6 for negligent misrepresentation. *Id.* On August 3, 2009, MLI filed its  
7 First Amended Counterclaims (Ct. Rec. 33), which Key now moves to  
8 dismiss.

9 The basis for MLI's negligent misrepresentation claim is that a Key  
10 representative, Thomas Sortomme, allegedly told MLI employees that MLI  
11 could finance its expansion with an industrial revenue bond transaction  
12 ("IRB") from the Port of Moses Lake. Mr. Sortomme allegedly assured MLI  
13 employees on several occasions that MLI qualified for the IRB. Several  
14 months later, the parties discovered that MLI did not qualify for the  
15 IRB. Believing it qualified, MLI incurred transactional costs in its  
16 application for the IRB, including legal fees for reviewing the  
17 application and charges from the City of Moses Lake. (Ct. Rec. 54 at 14,  
18.)

19 Key asserts three (3) reasons why MLI's counterclaim for negligent  
20 misrepresentation should be dismissed: 1) MLI has failed to state a claim  
21 for which relief may be granted because the negligent misrepresentation  
22 claim is an attempt to enforce an "agreement to agree," which is  
23 unenforceable under Washington law, (Ct. Rec. 42 at 4-6); 2) MLI failed  
24 to plead justifiable reliance on the misrepresentation, *id.* at 7-8; and  
25 3) MLI has not pled negligent misrepresentation with particularity. *Id.*  
26 at 9.

## II. Discussion

#### A. Rule 12(b)(6) Standard

A motion to dismiss under Federal Rule of Civil Procedure 12(b) (6) tests the legal sufficiency of the pleadings. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). A complaint may be dismissed for failure to state a claim under Rule 12(b) (6) where the factual allegations do not raise the right to relief above the speculative level. *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009); *Bell Atl. v. Twombly*, 550 U.S. 544, 555 (2007). Conversely, a complaint may not be dismissed for failure to state a claim where the allegations plausibly show that the pleader is entitled to relief. *Twombly*, 550 U.S. at 555. In ruling on a motion pursuant to Rule 12(b) (6), a court must construe the pleadings in the light most favorable to the claimant, and must accept all material factual allegations in the complaint, as well as any reasonable inferences drawn therefrom. *Broam v. Bogan*, 320 F.3d 1023, 1028 (9th Cir. 2003).

## B. Agreement to Agree

The elements of negligent misrepresentation under Washington law mirror the elements in the RESTATEMENT (SECOND) OF TORTS § 552, although Washington courts never adopted section 552 explicitly. See *Transamerica Title Ins. Co. v. Johnson*, 103 Wn.2d 409, 415-16 (1985); see also *Havens v. C & D Plastics, Inc.*, 124 Wn.2d 158, 180 (1994); *Hoffer v. Washington*, 110 Wn.2d 415, 427-28 (1988); *Habermann v. WPPSS*, 109 Wn.2d 107, 161-62 (1987). These elements are:

25            "1) One who, in the course of his business, profession, or  
26            employment, or in any other transaction in which he has  
              a pecuniary interest, supplies false information for the

1                 guidance of others in their business transactions, is  
2                 subject to liability for pecuniary loss caused to them by  
3                 their justifiable reliance upon the information, if he  
4                 fails to exercise reasonable care or competence in  
5                 obtaining or communicating the information.

- 6         2) Except as stated in Subsection (3), the liability stated  
7                 in Subsection (1) is limited to loss suffered  
8                 a) by the person or one of a limited group of persons  
9                         for whose benefit and guidance he intends to supply  
10                  the information or knows that the recipient intends  
11                  to supply it; and  
12                 b) through reliance upon it in a transaction that he  
13                  intends the information to influence or knows that  
14                  the recipient so intends or in a substantially  
15                  similar transaction."

16 RESTATEMENT (SECOND) OF TORTS § 552.

17                 Key argues that its representation regarding MLI's qualification for  
18                 the IRB constituted only an unenforceable agreement to agree. Although  
19                 agreements to agree may be unenforceable under contract law, this  
20                 counterclaim is in tort. Nothing in section 552 or in Washington case  
21                 law requires a claim for negligent misrepresentation to arise out of a  
22                 valid contract.

23                 Leaving aside justifiable reliance for the moment, Key does not  
24                 dispute that MLI has pled the section 552 elements of 1) a false  
25                 statement 2) supplied in the course of a business relationship 3) for  
26                 guidance in a business transaction and 4) failure to exercise reasonable  
               care in obtaining or communicating the information. According to the

1 pleadings, Mr. Sortomme gave materially false information in the course  
2 of Key's business relationship with MLI, and MLI relied on that  
3 information in a business transaction to its pecuniary detriment. Key  
4 knew that telling MLI it qualified for the IRB would encourage MLI to  
5 apply. Key's employee supplied the information directly to MLI  
6 employees. Furthermore, the misrepresentation induced MLI to enter  
7 pointless transactions that cost MLI money. It hired lawyers to review  
8 its IRB application and submitted a doomed application to the Port of  
9 Moses Lake. Therefore, aside from justifiable reliance, it is undisputed  
10 that MLI has pled the section 552 elements. The absence of an  
11 enforceable agreement is not a valid basis for dismissal of a claim in  
12 tort.

13 **C. Justifiable Reliance**

14 Under Washington law, a party must rely justifiably on a statement  
15 in order to recover for negligent misrepresentation. See, e.g.,  
16 *Transamerica*, 103 Wn. 2d at 415-16. This does not mean that the party  
17 must be fault-free in its reliance. Rather, it means only that the party  
18 must actually have relied and have had good reason to do so. See *Lawyers  
19 Title Ins. Corp. v Baik*, 147 Wn.2d 536, 552 (2002). Justifiable reliance  
20 is almost always a question of fact for the jury, unless it is absolutely  
21 clear from the face of the pleadings that the party did not rely  
22 justifiably. See *Barnes v. Cornerstone Inv. Inc.*, 54 Wn. App. 474,  
23 478-79 (1989).

24 Key argues that MLI cannot show justifiable reliance as a matter of  
25 law, and so its negligent misrepresentation counterclaim should be  
26 dismissed. According to Key, it was unreasonable for MLI to rely on  
Key's statements because financing under the IRB was to come from the

1 Port of Moses Lake, not Key. Additionally, after Mr. Sortomme informed  
2 the MLI employees that MLI would qualify, MLI hired outside counsel to  
3 review the deal. Finally, MLI's prior experience applying for an IRB  
4 with Key indicates that MLI was familiar with IRB financing and so could  
5 not have relied justifiably on Key's statements.

6 The Court concludes that reliance is an issue for the jury in this  
7 case. In cases in which parties were found not to have relied  
8 justifiably as a matter of law, the facts were much clearer than in this  
9 case. For example, in *Hoel v. Rose*, 125 Wn. App. 14, 22-23 (2004), the  
10 court found no justifiable reliance on a representation about the size  
11 of a parcel of land when the buyer had a full opportunity to inspect it  
12 and had contradictory information in his own appraisal. Similarly,  
13 Washington courts have found no justifiable reliance as a matter of law  
14 when the documents containing the alleged misrepresentation clearly  
15 stated that they were drafts and contained explicit disclaimers that they  
16 were not to be relied upon. See *ESCA Corp. v. KPMG Peat Marwick*, 135  
17 Wn.2d 820, 832-33 (1998); *Barnes*, 54 Wn. App. at 478-79. In another  
18 case, the Washington Supreme Court found that the plaintiff clearly had  
19 not relied on an appraiser's representation about the condition of his  
20 house because his complaint stated he knew about defects omitted from the  
21 appraiser's report when he bought the house, and he did not ask for the  
22 appraiser's report until a year later. *Schaaf v. Highfield*, 127 Wn.2d  
23 17, 30-31 (1995).

24 No comparable circumstances exist here. Indeed, many of the facts  
25 in the pleadings indicate that reliance was justified. The parties had  
26 a sixteen-year business relationship when this alleged misrepresentation  
occurred. In 1997, Key encouraged MLI to enter into an IRB transaction

1 with a Virginia authority for MLI's facility in Virginia. (Ct. Rec. 48  
 2 at 4.) Based on this, MLI claims to have a pattern of reliance on Key  
 3 in its IRB applications. Mr. Sortomme allegedly persuaded MLI to apply  
 4 for the 2008 IRB through his assurances that MLI would qualify. *Id.* MLI  
 5 retained bond counsel to review the 2008 IRB application, but it  
 6 allegedly did so only because Key said that it would qualify. Key offers  
 7 no authority for the proposition that retention of counsel after a  
 8 misrepresentation induces a transaction renders reliance on the  
 9 misrepresentation unjustifiable, and the Court has found none.  
 10 Furthermore, MLI would not have hired outside counsel at all had it not  
 11 been misinformed that it would qualify for the IRB.

12 In sum, construing the pleadings in the light most favorable to MLI,  
 13 the Court finds that MLI adequately pled justifiable reliance. *Cf. Shah*  
 14 *v. Allstate Ins. Co.*, 130 Wn. App. 74, 84-85 (2005) (holding that there  
 15 was a genuine issue of fact on justifiable reliance when a customer  
 16 historically relied on his insurance agent for insurance and the agent  
 17 repeatedly assured him about the adequacy of his coverage). Accordingly,  
 18 justifiable reliance is a fact question.

19 **D. Particularity**

20 Although the Ninth Circuit never explicitly held that negligent  
 21 misrepresentation claims must be pled with particularity under Federal  
 22 Rule of Civil Procedure 9(b), several district courts in this circuit  
 23 have so held. See, e.g., *Neilson v. Union Bank of Cal.*, N.A., 290 F.  
 24 Supp. 2d 1101, 1141 (C.D. Cal. 2003); *Glen Holly Entm't, Inc. v Tektronix,*  
 25 *Inc.*, 100 F. Supp. 2d 1086, 1093-94 (C.D. Cal. 1999); *Silicon Knights,*  
 26 *Inc. v. Crystal Dynamics, Inc.*, 983 F. Supp. 1303, 1316 (N.D. Cal. 1997).  
 Negligent misrepresentation claims must be pled with particularity

1 because it is necessary for the defendant to be aware of the specific  
2 statement at issue in order to prepare a proper defense, as is the case  
3 with fraud. In order to meet Rule 9(b)'s requirements, "the pleader must  
4 state the time, place, and specific content of the false representations  
5 as well as the identities of the parties to the misrepresentations."  
6 *Schreiber Distrib. Co. v. Serv-Well Furniture Co., Inc.*, 806 F.2d 1393,  
7 1401 (9th Cir. 1986) (citations omitted).

8 In this case, MLI did not plead all the required information in its  
9 First Amended Counterclaims. MLI claims that MLI employees Kristin  
10 Tofani, Pat Noga, and Michael Harvey met with Thomas Sortomme of Key on  
11 January 28, 2008, at MLI's Moses Lake office. (Ct. Rec. 33 at 4.)  
12 Further, MLI asserts that at this meeting Mr. Sortomme detailed the  
13 requirements to qualify for the 2008 IRB, and asserted that MLI  
14 qualified. *Id.* MLI also claims that from January 28 through May 22,  
15 2008, Mr. Sortomme repeatedly told Ms. Tofani, who was doubtful, that MLI  
16 qualified for the IRB.

17 Although MLI pled the time and place of the misrepresentation and  
18 the relevant parties for the initial misrepresentation, it did not plead  
19 that statement's specific content. The general assertion that Mr.  
20 Sortomme explained the requirements to qualify for the 2008 IRB and  
21 assured the MLI employees that MLI qualified is insufficient. MLI must  
22 plead further what the requirements were and why MLI was supposed to have  
23 qualified. With regard to the representations from January 28 through  
24 May 22, 2008, MLI must plead the specific dates and places of the  
25 misrepresentations.

26

#### E. MLI's Motion to Amend

Once a responsive pleading is filed, "a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." FED. R. CIV. P. 15(a)(2). Courts commonly consider four (4) factors when determining the propriety of a motion to amend: 1) bad faith, 2) undue delay, 3) prejudice to the opposing party, and 4) futility of amendment. *Ditto v. McCurdy*, 510 F.3d 1070, 1079 (9th Cir. 2007); see also *Foman v. Davis*, 371 U.S. 178 (1962) (identifying these factors). Whether to grant leave to amend is within the district court's discretion. See *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330 (1971); *Seay v. McDonnell Douglas Corp.*, 533 F.2d 1126, 1132 (9th Cir. 1976) overruled on other grounds by *Ellis v. Bhd. of Ry., Airline, and S.S. Clerks, Freight Handlers, Exp. and Station Employees*, 466 U.S. 435, 443 n.7 (1984).

16 Here, all these factors favor allowing amendment. Key has not  
17 argued that MLI's amendments were in bad faith or caused undue delay.  
18 Amendment will not prejudice Key in any way. This case is still in its  
19 early stages. Discovery is not complete. Finally, as stated above, the  
20 Court finds that amendment would not be futile. MLI needs only to plead  
21 necessary elements of the alleged misrepresentations with more  
22 specificity, which it has done in its Proposed Second Amended  
23 Counterclaims. (Ct. Rec. 54, Ex. A at 4-10.) Accordingly, the Court  
24 grants Defendant leave to amend.

### III. Conclusion

26 || Accordingly, IT IS HEREBY ORDERED:

1. Plaintiff's Motion to Dismiss (Ct. Rec. 40) is GRANTED.

2. Defendant's Motion to Amend Counterclaims (**Ct. Rec. 52**) is

**GRANTED.**

**IT IS SO ORDERED.** The District Court Executive is directed to enter this Order and distribute copies to counsel.

**DATED** this 11<sup>th</sup> day of March 2010.

S/ Edward F. Shea

EDWARD F. SHEA  
United States District Judge

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